

Newman v Gerzon

2009 NY Slip Op 31821(U)

August 7, 2009

Supreme Court, New York County

Docket Number: 110586/07

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 29

LINDA SUE NEWMAN,

INDEX NO. 110586/~~06~~ 07

Plaintiff,

MOTION DATE _____

MOTION SEQ. NO. 001-002

-v-

MOTION CAL. NO. _____

IGOR GERZON, D.D.S.,

Defendant.

The following papers, 1- 29, were read on this motion by defendant Igor Gerzon, D.D.S. for, *inter alia*, summary judgment, dismissing the complaint; and separate motion by plaintiff seeking to amend the bills of particulars, and to amend the *ad damnum*, to allege punitive damages in the amount of \$1,000,000.

MOTION SEQUENCE NO. 1

Notice of Motion - Affidavits - Exhibits - Memo of Law
Opposition /Plaintiff's Motion - Affidavits - Exhibits
Reply

Papers Numbered
1-15
16-24
25-26

MOTION SEQUENCE NO. 2

Notice of Motion - Affidavits - Exhibits
Opposition - Affidavits - Exhibits
Reply

Papers Numbered
(16-24)
27-29

Cross-Motion: Yes No

Plaintiff, Linda Sue Newman, treated with defendant, Igor Gerzon, D.D.S., from November 28, 1998 through June 11, 2006. During the course of plaintiff's treatment, Dr. Gerzon, performed crowns for teeth numbers 2 through 15. Dr. Gerzon made laminate/veneers for lower teeth numbers 20 through 31 and later replaced the veneers at teeth numbers 20, 21 and 28 with crowns. Dr. Gerzon provided plaintiff with posts and cores on teeth numbers 2, 3, 20, and 21 and

placed implants at teeth numbers 18 and 19. Dr. Gerzon also referred the patient to Dr. Scott Resnick for root canal therapies on several teeth and to Dr. Ruth for extractions and implants. During the course of Dr. Gerzon's treatment of plaintiff he was frequently recementing and redoling her restorations. According to Dr. Gerzon, the need to perform such work was necessitated by plaintiff's habit of continuously eating, chewing, and biting of "fireball" candies. Plaintiff disputes the fact that her need for dental work was occasioned by her ingestion of "fireballs" and points out that there are no references in Dr. Gerzon's entire chart relating to plaintiff's fireball habit.

Plaintiff commenced this instant dental malpractice action against Dr. Gerzon with the filing of a summons with notice on or about August 2, 2007. Plaintiff alleges in her complaint, which is dated November 29, 2007, that Dr. Gerzon was negligent in his performance of dental treatment rendered from November 28, 1998 to June 11, 2006 resulting in several injuries to plaintiff. Discovery has been completed, and, on or about November 26, 2008, a note of issue/certificate of readiness was filed. This action is now ready for trial. Defendant Dr. Gerzon presently moves for summary judgment, dismissing the complaint. Plaintiff by separate motion seeks to amend the bills of particulars, and to amend the *ad damnum*, to allege punitive damages in the amount of \$1,000,000.

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." (Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]). Initially, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers (see Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*). Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*).

Defendant, Dr. Gerzon presently moves for summary judgment, dismissing the complaint in its entirety, arguing that he did not depart from good and accepted dental practice in connection with the care and treatment rendered to plaintiff. Dr. Gerzon relies on, *inter alia*, an affidavit in which he sets forth, in his expert opinion, that he did not depart from accepted standards of dental practice in his treatment of plaintiff. Dr. Gerzon states in his affidavit that he timely and regularly diagnosed and treated decay in plaintiff. He sets forth that "[t]he problem was that [plaintiff] regularly chewed a hard candy of the jawbreaker type called 'fireballs'. The

[plaintiff] would regularly suck on them as well as bite them.” According to Dr. Gerzon, this habit caused rapid decay, and he stated in his affidavit that the plaintiff had a clear predisposition for decay and could have severe decay develop over a period of six (6) months or shorter. Further, with respect to the crowns and veneers he placed in plaintiff’s mouth, Dr. Gerzon states that such dental work was indicated and “all fit well when placed.” Dr. Gerzon states that subsequent x-rays taken by plaintiff’s subsequent treating dentist, Dr. Joseph S. D’Allesandro, showed a good fit of these restorations. However, Dr. Gerzon adds that these restorations were loosened /and or broken due to plaintiff’s hard candy biting and chewing habit. Dr. Gerzon addresses the crown placed on tooth number 4, setting forth that he never permanently cemented the crown on that tooth, because he believed that the tooth would ultimately have to be extracted because of its short roots.

Defendant’s expert affidavit also addresses the frequent recementing and redoing of restorations. He opines that such restorations had to be done because crowns would loosen or porcelains would fracture earlier than the average expected lifetime due to plaintiff’s own continuous eating, chewing, and biting of “fireball” candies. With respect to the tooth extractions plaintiff underwent, Dr. Gerzon states that he only recommended the extraction of teeth numbers 12 and 13, because those teeth were just old roots with old root canal therapies, and were severely decayed. According to Dr. Gerzon, these teeth were “hopeless.” Dr. Gerzon notes that the extractions that were performed while plaintiff was under his care, were performed by Dr. Gary Ruth, an oral surgeon. Dr. Gerzon states that plaintiff often bypassed him and went directly to Dr. Ruth, insisting on extractions, sometimes on teeth that Dr. Gerzon believed could be salvaged. Dr. Gerzon adds that with respect to any allegation relating to injury in connection with the extraction and loss of teeth numbers 2, 4, 5 and 31, such extractions occurred subsequent to the time during which he treated plaintiff.

Dr. Gerzon further sets forth in his affidavit that plaintiff “never really had any perio disease.” He states that he “did not do a perio chart because her perio pockets were within normal limits.” Dr. Gerzon also states that he “did not do regular cleanings since [he] would clean her teeth and remove decay on regular visits and her perio condition remained good.” Dr. Gerzon notes that plaintiff had a predisposition toward cavities, which was worsened “by her candy ‘fireball’ habit.” Moreover, according to Dr. Gerzon, the implants he placed in plaintiff’s mouth were indicated and were satisfactorily placed. Dr. Gerzon states that if an abutment needed replacing following the placement of an implant, as alleged by plaintiff, such need to replace an abutment is an accepted complication. Dr. Gerzon adds, however, that if plaintiff herein needed an abutment replaced “it would have been due to plaintiff’s incessant hard candy ‘fireball’ biting/chewing.” Dr. Gerzon also notes in his affidavit that although plaintiff alleges that the implant at tooth number 13 failed, it did so subsequent to the time during which he treated the plaintiff. With respect to any allegation that he failed to diagnose, or somehow caused TMJ in plaintiff, Dr. Gerzon states that plaintiff first presented to him with a pre-existing TMJ problem, and that she was already aware of her history of TMJ at that time. Dr. Gerzon also adds in his affidavit that his record keeping in connection with plaintiff’s treatment was adequate.

With respect to the informed consent obtained by Dr. Gerzon relating to his treatment of plaintiff, Dr. Gerzon states that he adequately explained the procedures, risks, alternatives to plaintiff, who he described as "dentally savvy." Additionally, Dr. Gerzon addresses plaintiff's own culpable conduct in his affidavit, stating that plaintiff was negligent as a patient and caused her own problems by continuously sucking, chewing, biting, and eating hard "fireball" jawbreakers. This habit, according to Dr. Gerzon, pooled sugar at the neck of the teeth and caused decay and the porcelain on her teeth to crack. Dr. Gerzon further notes that, *inter alia*, plaintiff smoked cigarettes and marijuana, and drank a lot of coffee, negatively effecting her periodontal health. Dr. Gerzon opines that it was plaintiff's failure to exercise ordinary care, unreasonable behavior and negligence as a patient, as opposed to his allegedly negligent treatment, that proximately caused any and all injuries of which plaintiff complains.

Dr. Gerzon further argues that he is entitled to summary judgment with respect to any claims relating to treatment rendered to plaintiff prior to February 2, 2005, based upon the applicable statute of limitations. Apparently acknowledging that where there is a continuous course of treatment for the conditions giving rise to this malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment (see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Langsam v. Terraciano*, 22 A.D.3d 414 [1st Dept. 2005]), Dr. Gerzon states in his affidavit that the treatment performed prior to February 2, 2005, was completed by that date, and that the subsequent treatment was not a continuous course of treatment relating to plaintiff's earlier treatment. Dr. Gerzon specifically sets forth that:

"[c]rowns are dentally completed upon being permanently cemented in final. Laminates/veneers are dentally completed upon insertion. Posts and cores are completed when inserted and performed. Root canal therapies are completed when the excavated canals are filled with gutta percha. Implants are completed upon insertion. Extractions are (obviously) completed when the tooth is removed.

As the treating dentist of plaintiff, I can and do attest and opine, to a reasonable degree of dental certainty, that the treatments, which are the subject of this motion, were all fully, distinctly and dentally completed well before February 2, 2005"

According to Dr. Gerzon, the only treatment that he rendered to plaintiff subsequent to February 2, 2005, other than routine examinations and check-ups, were a temporary bridge from teeth numbers 7 through 10; final re-doing of crowns from teeth numbers 7 through 10 and tooth number 30; and the recementing of the crown on tooth number 31.

In opposition to defendant's motion, plaintiff submitted an expert affidavit from a licensed dentist. According to plaintiff's expert, there were several departures from good and acceptable dental practices on the part of Dr. Gerzon in connection with plaintiff's treatment. Plaintiff's expert also opines that such departures were "proximate, contributing causes of injuries

sustained by plaintiff.” This expert first opines that Dr. Gerzon departed from good and acceptable dental practice by failing to effectively treat decay of teeth numbers 22-27. As plaintiff’s expert explains, based upon the degree of decay that existed on July 31, 2006, when plaintiff presented to her subsequent treating dentist, Dr. Joseph S. Dallessandro, such decay existed during the period of time that Dr. Gerzon treated plaintiff. According to plaintiff’s expert, Dr. Gerzon’s failure to treat the decay that existed while he treated plaintiff constituted a departure from good and accepted dental practice. Plaintiff’s expert also sets forth that Dr. Gerzon’s failure to effectively treat this decay in a timely manner was a competent producing cause of the injuries sustained by plaintiff. The expert states that if the decay in plaintiff’s teeth had been treated in a timely manner, root canal therapy performed on these teeth would not have been needed and the fillings would have been smaller, if not completely unnecessary.

Plaintiff’s expert next addresses the placement of an abutment and implant crown on tooth number 13, which was placed on plaintiff on or about January 5, 2006. According to plaintiff’s expert, a custom abutment and implant crown should last longer than nine (9) months. In the expert’s opinion the failure of this dental work at or around nine (9) months following the performance of same is the result of “Dr. Gerzon’s lack of care in placing the implant either in preparation, sizing, and/or cementing, and that his placement of the abutment and crown constituted a departure from good and acceptable dental practice.” The expert further states that this departure caused plaintiff to sustain personal injuries including having to remove and replace the abutment and crown.

With respect to the placement of the temporary crown placed by Dr. Gerzon on tooth number 20, plaintiff’s expert opines that Dr. Gerzon’s failure to place a permanent crown within a reasonable period of time after March 11, 2002 and before he last treated plaintiff on June 11, 2006, constituted a departure from good and acceptable dental practice. The expert states that temporary crowns are not intended to be placed for extended periods of time, that they are not durable nor made of materials that are durable, and that they must be replaced in a reasonably short period of time. Plaintiff’s expert notes that by placing a temporary crown, it is indicated that Dr. Gerzon had started the job and until he placed the permanent crown, that the job was not finished. According to this expert, a failure to timely place a permanent crown was the competent cause of injuries sustained by the plaintiff, specifically causing the post and crown in tooth number 20 to fall out, requiring the placement of a new post and the recementing of the crown. With respect to the treatment of tooth number 4, plaintiff’s expert sets forth that although a permanent crown was placed on this tooth, Dr. Gerzon’s use of temporary cement was a departure from good and accepted dental practice. The expert sets forth that temporary cement is a substance designed to fix a crown in position for a finite period of time, not permanently, and it is anticipated that a permanent crown will be fixed in place with permanent cement. Plaintiff’s expert opines that the failure on the part of Dr. Gerzong to permanently cement this crown caused injury to plaintiff, including the crown falling out, gross decay under tooth number 4, as well as the need for that tooth to be extracted. Plaintiff’s expert also adds that plaintiff was a patient of Dr. Gerzon on a steady and continuous basis from 1998 through 2006, and could

have reasonably assumed that the Dr. Gerzog would have replaced the temporary cement with permanent cement while under his care.

Plaintiff's expert next addresses Dr. Gerzon's treatment of tooth number 31. The expert sets forth that a crown was permanently cemented on tooth number 31 in September of 2003, recemented in May of 2006, and recemented again in June of 2006. Thereafter, on May 30, 2007, when plaintiff was under the care of Dr. Dallessandro, the crown became loose exposing tooth decay, leaving the tooth non-salvageable, which required extraction. According to plaintiff's expert, "[s]ince there was no evidence of tooth decay around the margins of the crown noted in Dr. Dallessandro's chart, the only reasonable inference that can be drawn is that the decay was present when the crown was recemented on June 11, 2006." The expert opines that the cementing of the crown without first ensuring that all decay was removed was a departure from good and accepted dental practice. The expert further opines that this departure caused plaintiff to sustain personal injuries, namely the loss of tooth number 31. Additionally, plaintiff's expert states that based upon the facts presented herein, defendant's treatment of tooth number 31 clearly amounted to continuous treatment of the same condition from September 2003 to June 2006.

Lastly, plaintiff's expert addresses the defendant's failure to periodically inspect the laminates on teeth numbers 20-28. Plaintiff's expert sets forth that on January 20, 2000 Dr. Gerzon prepped plaintiff's teeth numbers 20-28 for the placement of laminates, and placed such laminates in plaintiff's mouth in or about late January or early February 2000. According to the expert, "the decay that was detected on July 31, 2006 by Dr. Dallessandro indicates that Dr. Gerzon breached his duty to periodically inspect the laminates to ensure that there is no decay and to enable him to treat decay, if extant, at the earliest possible date." In the expert's opinion, Dr. Gerzon's failure to periodically inspect these laminates caused plaintiff to sustain injuries to teeth #'s 22-27. The expert states that had Dr. Gerzon inspected the laminates periodically, "he would have probably detected the decay that had existed underneath them and eliminated, or at least, significantly reduced the amount of restorative dental work needed to be performed on Ms. Newman's underlying teeth and laminates themselves by subsequent treating dentists."

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether Dr. Gerzon departed from good and accepted dental practice in (1) failing to periodically inspect the laminates on teeth numbers 20-28 and effectively treat decay of teeth numbers 22-27; (2) in failing to properly place an abutment and implant crown on tooth number 13¹; (3) in failing to place a permanent crown on

¹ The original bill of particulars sets forth that Dr. Gerzon was negligent in connection with the placement of an implant at tooth number 13. Plaintiff presently moves to amend his bill of particulars to allege that Dr. Gerzon was negligent in failing to properly place an abutment and crown at tooth number 13. A discussion relating to plaintiff's motion to amend the bills of particulars is set forth below.

tooth number 20; (4) in failing to use permanent cement in connection with the permanent crown placed on tooth number 4; and (5) In the cementing of the crown on tooth number 31 without first ensuring that all decay was removed. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). Notwithstanding the foregoing, plaintiff's expert does not state in his affidavit that Dr. Gerzon departed from good and accepted dental practice in failing to provide plaintiff with perio treatment, failing to diagnose and/or causing plaintiff's TMJ, failing to keep adequate office records, nor does plaintiff's expert expressly state that Dr. Gerzon departed in connection with several other specific treatments addressed by Dr. Gerzon in his affidavit. Where plaintiff's expert has not offered such opinion, thereby failing to rebut Dr. Gerzon's opinion that he acted in accordance with the standard of care in connection with such treatment, plaintiff has not established the existence of material issues of fact which require a trial in the action with respect to those issues.

The Court finds that those claims asserted by plaintiff for which her expert demonstrated that issues of fact and credibility exist, as set forth above, are not time-barred by the applicable statute of limitations. In connection with plaintiff's claim that Dr. Gerzon failed to periodically inspect the laminates on teeth numbers 20-28 and effectively treat decay of teeth numbers 22-27, it is clear that in the expert's opinion Dr. Gerzon had a continuing duty to inspect the laminates and treat decay until the time when plaintiff stopped treating with Dr. Gerzon on June 11, 2006. Therefore, the malpractice is alleged to have occurred during the limitations period, *i.e.*, on February 2, 2005 or thereafter. Similarly, with respect to plaintiff's claim that Dr. Gerzon failed to properly place an abutment and implant crown on tooth number 13, such work was performed on January 6, 2006, which is during the limitations period.

With respect to the placement of the temporary on tooth number 20, plaintiff's expert opines that Dr. Gerzon's failure to place a permanent crown within a reasonable period of time after March 11, 2002, and before he last treated plaintiff on June 11, 2006, constituted a departure from good and acceptable dental practice. Based upon the affidavit of plaintiff's expert, the Court finds that an issue of fact exists with respect to whether plaintiff was receiving continuous treatment from March 11, 2002, to her last visit on June 11, 2006, in connection with the crown placed on tooth number 20. As set forth above, the expert states that temporary crowns are not intended to be placed for extended periods of time and that they must be replaced in a reasonably short period of time. Plaintiff's expert noted that by placing a temporary crown on the tooth, it indicates that Dr. Gerzon had started the job, but until he placed the permanent crown, the job was not finished. It is noted that plaintiff submitted an affidavit in opposition to Dr. Gerzon's motion, in which she states that she "always assumed that work on a particular tooth would be completed when a permanent crown was inserted using permanent cement." As a result of such expert opinion, as well as the affidavit of plaintiff, the Court finds that an issue of fact exists as to whether Dr. Gerzon ever completed the crown on tooth number 20, and plaintiff was receiving continuous treatment with respect to same, until the time she ceased her treatment with Dr. Gerzon.

Similarly, with respect to the treatment of tooth number 4, plaintiff's expert sets forth that although a permanent crown was placed on this tooth, Dr. Gerzon's use of temporary cement was a departure from good and accepted dental practice. The expert sets forth that temporary cement is a substance designed to fix a crown in position for a finite period of time, not permanently, and it is anticipated that a permanent crown will be fixed in place with permanent cement. Plaintiff's expert opines that plaintiff was a patient of Dr. Gerzon on a steady and continuous basis from 1998 through 2006, and could have reasonably assumed that Dr. Gerzon would have replaced the temporary cement with permanent cement while under his care. Again it is noted that plaintiff stated in her affidavit that she "always assumed that work on a particular tooth would be completed when a permanent crown was inserted using permanent cement." The Court finds that based upon these affidavits an issue of fact exists as to whether Dr. Gerzon ever completed the crown on tooth number 4, and plaintiff was receiving continuous treatment with respect to same until the time she ceased her treatment with Dr. Gerzon.

In connection with Dr. Gerzon's treatment of tooth number 31, Dr. Gerzon allegedly departed from the standard of care in the cementing of the crown on that tooth without first ensuring that all decay was removed. A crown was permanently cemented on tooth number 31 in September of 2003, recemented in May of 2006, and recemented again in June of 2006. Plaintiff's expert states that based upon the facts presented herein, Dr. Gerzon's treatment of tooth number 31 clearly amounted to continuous treatment of the same condition from September 2003 to June 2006. Based on the affidavit of plaintiff's expert, an issue of fact exists as to whether Dr. Gerzon's treatment of tooth number 31 amounted to continuous treatment of the same condition from September 2003 to June 2006.

Lastly, although plaintiff has not included a cause of action for lack of informed consent in her complaint, Dr. Gerzon moved for summary judgment with respect to same, as allegations of lack of informed consent were included in plaintiff's bill of particulars. As plaintiff has not put forth any evidence that demonstrates that she was not sufficiently informed of the risks, benefits and alternatives of the treatment rendered by Dr. Gerzon (see Public Health Law § 2805-d[3]), it appears that plaintiff does not have a sustainable cause of action for lack of informed consent. (see Thompson v. Orner, 36 AD3d 791 [2d Dept. 2007]; Dickstein v. Dogall, 303 AD2d 443 [2d Dept. 2003]; Dunlop v. Sivaraman, 272 AD2d 570 [2d Dept. 2000]).

Plaintiff by separate motion seeks to amend his bill of particulars to allege that Dr. Gerzon was negligent in failing to properly place an abutment and crown at tooth number 13, as opposed to the negligent placement of an implant at that very same tooth, as alleged in the original bill of particulars. Plaintiff sets forth that the error in the initial bill of particulars and the need for the instant motion to amend that bill of particulars was caused by the confusion between Dr. Gerzon's chart notes, his billing records, and his testimony. Plaintiff further seeks to amend the complaint by adding a claim for punitive damages, as well as amending the *ad damnum* clause to allege damages in the amount of \$1,000,000.00. Plaintiff seems to argue that

if the Court concludes that Dr. Gerzon billed plaintiff for the placement of an abutment and implant crown at tooth number 13, but did not perform such work, then plaintiff should be entitled to punitive damages.

In Romanello v. Jason, 303 AD2d 670 [2d Dept. 2003], the Appellate Division, Second Department, addressed a plaintiff's motion to amend a bill of particulars subsequent to the filing of a note of issue, stating that:

Once a note of issue has been filed, a plaintiff may not serve an amended bill of particulars without obtaining leave of the court (see CPLR 3042 [b]; Barrera v City of New York, 265 AD2d 516, 518 [1999]). Leave should be freely given in the absence of prejudice or surprise to the opposing party (see Barrera v City of New York, *supra*; Smith v Plaza Transp. Ambulance Serv., 243 AD2d 555 [1997]; Kyong Hi Wohn v County of Suffolk, 237 AD2d 412 [1997]; Volpe v Good Samaritan Hosp., 213 AD2d 398 [1995]). Moreover, when a plaintiff has been guilty of an extended delay in moving to amend, he or she must provide a reasonable excuse for the delay in making the motion and the merits thereof (see Volpe v Good Samaritan Hosp., *supra*).

The standard to be employed by the Court in deciding motions to amend a bill of particulars is akin to that set forth by CPLR 3025(b), which governs applications to supplement or amend pleadings (see Koch v. St. Francis Hospital, 112 AD 2d 142 [2d Dept. 1985]; Maloney v. Union Free School District No. 7, 46 AD2d 789 [2d Dept. 1974]). CPLR 3025(b) sets forth, in pertinent part that, leave to amend a pleading "shall be freely given upon such terms as may be just . . ." Notwithstanding, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be 'discreet, circumspect, prudent and cautious'" (see Cseh v. New York City Transit Authority, 240 AD2d 270 [1st Dept. 1997]; see also Countrywide Funding Corp. v. Reynolds, 41 AD3d 524 [2d Dept. 2007][“where an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, ‘judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious’”]; Comsewogue Union Free School Dist. v. Allied-Trent Roofing Systems Inc., 15 AD3d 523 [2d Dept. 2005][“when leave [to amend] is sought on the eve of trial, judicial discretion should be exercised sparingly”]).

First, plaintiff's motion seeks to amend his bill of particulars to allege that Dr. Gerzon was negligent in failing to properly place an abutment and crown at tooth number 13, as opposed to the negligent placement of an implant at that very same tooth, as alleged in the original bill of particulars. This portion of plaintiff's motion is granted and plaintiff's bill of particulars shall be amended to allege that Dr. Gerzon was negligent in failing to properly place an abutment and crown at tooth number 13. The Court finds that permitting this amendment would not prejudice Dr. Gerzon, nor should it be cause for surprise. This amendment simply seeks to change the allegations of negligence to relate to the placement of an abutment and crown, as opposed to the placement of an implant, of the very same tooth, *i.e.*, tooth number 13. Such amendment

does not change the theory of plaintiff's case in any material way, nor does it materially change injuries as alleged by plaintiff. Instead of alleging that plaintiff was injured as a result of the failure of an implant at tooth number 13, plaintiff now alleges that she was injured as a result of the failure of the abutment and crown placed on that tooth by Dr. Gerzon on or about January 6, 2006. Moreover, as Dr. Gerzon has always been in possession of his plaintiff's chart, as well as her billing records, he should have been aware of the work that he performed on plaintiff while she was under his care from the outset of the instant action.

Plaintiff explains that the error in the initial bill of particulars and the need for the instant motion to amend that bill of particulars was caused by the confusion between Dr. Gerzon's chart notes, his billing records, as well as Dr. Gerzon's testimony. Plaintiff sets forth that although there appears to be no chart entries relating to the placement of an abutment and crown at tooth number 13, it is now clear from the billing records that plaintiff was billed for such work on January 5, 2006. With respect to the merit of this amendment, plaintiff's expert states in the affidavit submitted in connection with this motion that abutment and implant crown on tooth number 13 should last longer than nine (9) months. The expert opines that the failure of this dental work at or around nine (9) months following the performance of same is the result of "Dr. Gerzon's lack of care in placing the implant either in preparation, sizing, and/or cementing, and that his placement of the abutment and crown constituted a departure from good and acceptable dental practice." The expert further states that this departure caused plaintiff to sustain personal injuries including having to remove and replace the abutment and crown. Based upon the absence of prejudice or surprise to Dr. Gerzon, the excuse provided by plaintiff, the merits of the proposed amendment, as well as the fact that this is not a situation where an amendment is sought on the eve of trial, as a trial date has not yet been set, the Court, in its discretion, will permit this amendment.

Notwithstanding the foregoing, as the record is devoid of any evidence that Dr. Gerzon's conduct was so wantonly dishonest, grossly indifferent to patient care, or so malicious and/or reckless to raise an issue of fact as to punitive damages as against him, the amendment plaintiff sought enabling them to assert a claim for punitive damages and amend the *ad damnum* clause to allege damages in the amount of \$1,000,000.00 will not be permitted (see Williams v. Halpern, 25 AD3d 467 [1st Dept. 2006]; Arnold v. Siegel, 296 AD2d 363 [2d Dept. 2002]; Charell v. Gonzalez, 251 AD2d 72 [1st Dept. 1998]; Luby v. St. John's Episcopal Hosp., 220 AD2d 390 [2d Dept. 1995]; cf. Graham v. Columbia-Presbyterian Medical Center, 185 AD2d 753 [1st Dept. 1992]).

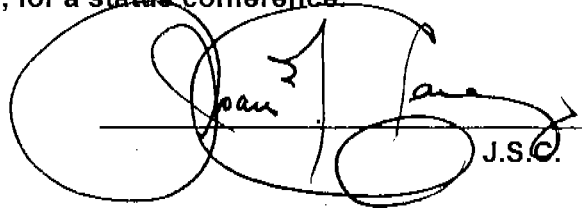
Based on the foregoing, it is hereby

ORDERED that defendant Igor Gerzon, D.D.S.'s motion for summary judgment, dismissing the complaint is denied; and it is further

ORDERED that plaintiff's motion seeking to amend the bills of particulars, and to amend the *ad damnum* to allege punitive damages in the amount of \$1,000,000 is granted only to the extent that plaintiff's bill of particulars shall be amended to allege that Dr. Gerzon was negligent in failing to properly place an abutment and crown at tooth number 13; and it is further

ORDERED that counsel for all parties are to appear before the court on August 14, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a status conference.

Dated: 8/7/2009



Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

FILED
AUG 14 2009
COUNTY CLERK'S OFFICE
NEW YORK